Supreme Court, U.S.
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No. 05-1337

In The

Supreme Court of the United States

RONNIE GARNER,

Petitioner,

v.

STEPHANIE GONZALES, PAMELA S. HYDE, JAMES LOUGHREN, IRA ROBINSON, MICHAEL D. BUSTAMANTE, and MICHAEL E. VIGIL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 17, 2006

QUESTION PRESENTED FOR REVIEW

Can original federal jurisdiction be denied by a federal district court pursuant to the *Rooker-Feldman* doctrine of a 42 U.S.C. § 1983 action filed in reliance on the *Ex Parte Young* doctrine to remedy ongoing violations of federal law and violations of federal rights by state officials acting under color of state law?

LIST OF AFFILIATED CORPORATIONS

There are no corporations or affiliated corporations involved with this case. All parties to the proceeding are listed in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF AFFILIATED CORPORATIONS	ii
TABLE OF AUTHORITIES	iv
CITATIONS TO OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
A. THE TENTH CIRCUIT'S APPLICATION OF THE *ROOKER-FELDMAN* DOCTRINE TO DENY FEDERAL SUBJECT MATTER JURISDICTION WAS ERROR	4
B. THE TENTH CIRCUIT COURT OF APPEALS ERRED BY FAILING TO ANALYZE THE CASE UNDER THE *EX PARTE YOUNG* DOCTRINE	6
C. PETITIONER'S COMPLAINT DOCUMENTED A SUFFICIENT BASIS FOR FEDERAL JURISDICTION UNDER THE *EX PARTE YOUNG* DOCTRINE	7
SUMMARY	10
CONCLUSION	11
PRAYER	11

TABLE OF AUTHORITIES

Page

CASES

Dist. of Columbia Ct. of App. v. Feldman, 460 U.S. 462 (1983) 4, 10

Ex Parte Young, 209 U.S. 123 (1908) ..... *passim*

Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280 (2005) 5, 6, 7, 10

GASH Assocs. v. Village of Rosemont, 995 F.2d 726 (CA7 1983) 5

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 6, 10

Noel v. Hall, 341 F.3d 1148 (CA9 2003) 5

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 4, 7, 10

Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635 (2002) 4

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1257(a) 5

28 U.S.C. § 1331 ..... *passim*

42 U.S.C. § 667 ..... 2, 4

42 U.S.C. § 1983 ..... *passim*

NMSA 1978 § 40-4-11 9

45 C.F.R. § 302.56 ..... 2, 4

CITATIONS TO THE OPINION BELOW

Ronnie Garner prays the Supreme Court grant a writ of certiorari to review the judgment of the court below.

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit, No. 05-2096 (D.C. No. CIV-04-1314 RHS/ACT) (D. N.M.) filed February 2, 2006; Petition for Panel Rehearing was denied February 28, 2006.

JURISDICTION

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit was entered February 2, 2006. **App. 1** A Petition for Panel Rehearing was timely filed February 14, 2006. **App. 14** The Petition for Panel Rehearing was denied February 28, 2006. **App. 9**

This Court has jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Congress shall have Power to Lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and Provide for the common defense and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States;

United States Constitution, Article 1, Section 8, Clause 1.

Child Support Enforcement Program, Title 42, Chapter 7, Subchapter IV Part D, 42 U.S.C. § 667. **App. 11**

Code of Federal Regulations, Title 45, Chapter III, Child Support Enforcement Program, § 302.56. **App. 12**

STATEMENT OF THE CASE

Petitioner filed a Complaint in U.S. District Court alleging violations of 42 U.S.C. § 1983 by six state officials acting under color of state law and praying for only prospective and injunctive relief under the *Ex Parte Young* doctrine, *Ex Parte Young*, 209 U.S. 123, for alleged ongoing violations of federal law, specifically 42 U.S.C. § 667 and its implementing regulations, 45 C.F.R. § 302.56, enacted under Congress' Spending Power, United States Constitution, Article 1, Section 8, Clause 1.

Because there was a previous state court decision that Petitioner referenced in his Complaint to help document alleged ongoing violations of federal law and Petitioner's rights in his § 1983 action, Defendants claimed Petitioner was attempting to alter or overturn a previous state court decision; thus, the federal district court lacked jurisdiction based upon the *Rooker-Feldman* doctrine; as well as *Domestic Relations, Eleventh Amendment,* and *Abstention* defenses.

The U.S. District Court granted Defendant's Motion to Dismiss with prejudice and without any discussion or analysis. **App. 7**

Petitioner timely appealed to the Tenth Circuit Federal Court of Appeals.

The Tenth Circuit panel issued its Order and Judgment on February 2, 2006 that stated, on page 3, that the case could be dismissed, "On any number of grounds for want of subject matter jurisdiction." (The Tenth Circuit panel did not enumerate the "number of grounds"), but then stated, "The clearest ground for dismissal of this matter was on the basis of the *Rooker-Feldman* doctrine." **App. 3**

The Tenth Circuit's analysis appeared to be that any "look" at the previous state court decision, even to document allegations of ongoing violations of federal law and federal rights in violation of § 1983, filed under the *Ex Parte Young* exception, was prohibited by the *Rooker-Feldman* doctrine and thus the federal district court lacked subject matter jurisdiction.

Because the Tenth Circuit misapplied the *Rooker-Feldman* doctrine in this case, it never reached the issue of the *Ex Parte Young* doctrine and thus did not ask the critical questions, required under the *Ex Parte Young* doctrine, to assess whether Petitioner's Complaint 1) alleges ongoing violation of federal law and 2) seeks only relief that is properly characterized as prospective.

The three issues raised by the Tenth Circuit decision that merit review by this Court are:

1. Whether Plaintiff satisfied the requirements for federal jurisdiction under 28 U.S.C. § 1331.

2. Whether the *Rooker-Feldman* doctrine was improperly applied by the Tenth Circuit to deny federal subject matter jurisdiction of a properly pled § 1983 action filed under the *Ex Parte Young* doctrine.

3. Whether the allegations against state employees acting under color of state law contained in Petitioner's complaint, filed under 42 U.S.C. § 1983, met the criteria of the *Ex Parte Young* doctrine enumerated by this Court.

REASONS TO GRANT THE PETITION

A. THE TENTH CIRCUIT'S APPLICATION OF THE *ROOKER-FELDMAN* DOCTRINE TO DENY FEDERAL SUBJECT MATTER JURISDICTION WAS ERROR.

Petitioner's complaint in this case sought to invoke the original jurisdiction of the Federal District Court for New Mexico. 28 U.S.C. § 1331 states, "The district courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Petitioner's complaint was an original civil action against state actors alleging that they violated federal law, specifically 42 U.S.C. § 667 and implementing regulations, 45 C.F.R. § 302.56.

The *Rooker-Feldman* doctrine was improperly applied by the Tenth Circuit to dismiss Plaintiff's Complaint because the *Rooker-Feldman* doctrine only bars subject matter jurisdiction of appeals of decisions from the highest state court to a federal district court and is based upon the principal that under 28 U.S.C. § 1257(a) original jurisdiction for appeals from the highest state court lies only in this Court. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Dist. of Columbia Ct. of App. v. Feldman*, 460 U.S. 462 (1983); and *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005). This Court in *Exxon Mobil Corp.*, supra, at 288, cited *Verizon Maryland, Inc. v. Public*

Service Commission of Maryland, 535 U.S. 635, at 644, n. 3 (2002) that stated:

> "The *Rooker-Feldman* doctrine merely recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise jurisdiction over state-court judgments, which Congress reserved to this Court, see 28 U.S.C. § 1257(a)."

Furthermore, *Exxon Mobile Corp. v. Saudi Basic Industries Corp.*, supra, p. 295, stated:

> "Nor does § 1257 stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.' *GASH Assocs. v. Village of Rosemont*, 995 F. 2d 726, 728 (CA7 1993); accord *Noel v. Hall*, 341 F. 3d 1148, 1163-1164 (CA9 2003)."

Thus, the *Rooker-Feldman* doctrine has a very narrow application limited to state court plaintiffs who have litigated and lost in state courts and subsequently invite the federal district courts to review and reject a state-court decision. The recent holding by this Court in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005) admonished federal courts against applying the *Rooker-Feldman* doctrine to civil actions brought in federal district court, such as a § 1983 action filed under the *Ex Parte Young* doctrine that alleges an ongoing violation of federal law, where only relief properly characterized as prospective is requested.

In the present case, the Tenth Circuit did not apply the rule enumerated in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, supra, and thus the U.S. District Court and the Tenth Circuit Court of Appeals failed to properly find jurisdiction under 28 U.S.C. § 1331.

The Tenth Circuit erred and violated this Court's prior holdings by improperly denying jurisdiction under the *Rooker-Feldman* doctrine.

B. THE TENTH CIRCUIT COURT OF APPEALS ERRED BY FAILING TO ANALYZE THE CASE UNDER THE *EX PARTE YOUNG* DOCTRINE.

Petitioner filed a federal district court complaint, under the original jurisdiction provided by 28 U.S.C. § 1331, alleging ongoing violations of federal law against state actors acting under color of state law. Such actions against state officials are allowed pursuant to 42 U.S.C. § 1983 by the *Ex Parte Young* doctrine.

This Court in *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, at 296 & 298-299 (1997) elaborated a "straightforward inquiry" into § 1983 suits filed under the *Ex Parte Young* doctrine that requires only: 1) whether the complaint alleges an ongoing violation of federal law and 2) whether the complaint seeks only relief properly characterized as prospective. If these two criteria are met, a complaint states a good cause of action and federal jurisdiction is granted.

However, the Tenth Circuit in the present case not only failed to apply criteria for an *Ex Parte Young* doctrine analysis but also misapplied the *Rooker-Feldman* doctrine even after reviewing this Court's decision in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005).

The Tenth Circuit stated on page 4 of its Order and Judgment filed February 2, 2006, in footnote 2:

> "The recent clarification by the Supreme Court of the scope of *Rooker-Feldman* in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005) does not affect the outcome of this case." **App. 4**

The Tenth Circuit's failure to analyze this matter under the specific criteria of the *Ex Parte Young* doctrine is error and places its decision in conflict with the prior decisions of this Court.

C. PETITIONER'S COMPLAINT DOCUMENTED A SUFFICIENT BASIS FOR FEDERAL JURISDICTION UNDER THE *EX PARTE YOUNG* DOCTRINE.

The Complaint (**App. 29**) alleges six ongoing violations of federal law and Petitioner's rights by state officials acting under color of state law. Furthermore, the Complaint seeks only prospective declaratory and injunctive relief as required by this Court, *Ex Parte Young*, 209 U.S. 123 (1908). The *Ex Parte Young* doctrine only requires the satisfaction of two criteria in order for the cause of action to escape the Eleventh Amendment's prohibition against suing state officials: 1) whether the complaint alleges an ongoing violation of federal law and 2) only seeks relief properly characterized as prospective. The prospective relief requested by Petitioner in the Complaint (**App. 58-60**) as follows:

> "1. Declare that New Mexico's laws are defective and that Defendants violated Plaintiff's rights under IV-D statutes and implementing regulations by failing to review child support award amounts every four years and/or failing to use current economic data for the cost of raising children in New

Mexico or other sources of economic data for the review of child support guideline award amounts.

2. Declare that New Mexico's laws are defective and that Defendants violate Plaintiff's rights under IV-D statues and implementing regulations by failing to allow rebuttal of the presumptive child support guideline award amount.

3. Declare that New Mexico's laws are defective and that Defendants violate Plaintiff's rights under IV-D statutes and implementing regulations by failing to allow Plaintiff a hearing to present evidence in child support adjudication.

4. Declare that New Mexico's laws are defective and that Defendants violate Plaintiff's rights under IV-D statutes and implementation regulations by failing to provide precise and reasonable criteria in New Mexico's statutes such that the intent and obligations of federal law are followed for child support adjudication.

5. Declare that New Mexico's laws are defective and that Defendants violated Plaintiff's rights under IV-D statutes and implementing regulations by using child support guideline award amounts that are not based on scientific principles and current economic data.

6. Declare that New Mexico's laws are defective and that Defendants violated Plaintiff's procedural and substantive due process rights under the Fifth and Fourteenth Amendments of the United States Constitution.

7. Declare that under Congress' Spending Powers that federal law preempts New Mexico statutes and court decisions that do not precisely

comply with federal child support enforcement law and regulations.

8. Grant Plaintiff injunctive relief under 42 U.S.C. § 1983 if declaratory relief is not available against Defendants Loughren, Robinson, Vigil, and Bustamante.

9. Enter a permanent injunction to require state officials and employees in New Mexico to comply with federally mandated procedures.

10. Enter a permanent injunction to require that New Mexico develop child support awards that are based on current and scientifically provable data.

11. Enter a permanent injunction to require that when New Mexico amends its child support enforcement statute NMSA 1978 § 40-4-11, that any amendment is sent for review to the Federal Child Support Enforcement Office to ensure the amendment does not violate federal law.

12. Award Plaintiff reasonable attorney's fees and cost; and

13. Award such other relief as this Court deems just and proper."

Thus, Petitioner never requested relief that would alter or reverse a concluded state court case. Therefore, federal subject matter jurisdiction should have been granted in the present case by the U.S. District Court and the Tenth Circuit Court of Appeals under the *Ex Parte Young* doctrine.

SUMMARY

It is important to grant certiorari in this case because:

1. The U.S. District Court and the Tenth Circuit Court of Appeals ("Tenth Circuit") improperly refused to grant federal jurisdiction of this case under 28 U.S.C. § 1331.

2. The Tenth Circuit failed to apply the criteria enumerated by this Court in *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, at 296 & 298-299 (1997). The failure of the Tenth Circuit to recognize that original jurisdiction properly exists in federal district court under the *Ex Parte Young* doctrine in this matter is error and contradicts this Court's prior holdings.

3. The Tenth Circuit by its decision in this case, has placed itself in conflict with this Court's holdings in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Dist. of Columbia Ct. of App. v. Feldman*, 460 U.S. 462 (1983) and *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005).

Specifically, this Court held in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, at 285 (2005) that the *Rooker-Feldman* doctrine should not be applied to cases that fit into 28 U.S.C. § 1331 jurisdictional categories. Thus, the *Rooker-Feldman* doctrine was improperly applied by the district court and the Tenth Circuit to bar federal jurisdiction of Petitioner's Complaint, in conflict with this Court's prior decisions.

4. The Complaint filed by Petitioner in the U.S. District Court is sufficient to meet the straightforward analysis for application of the *Ex Parte Young* doctrine as outlined in *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, at 296 & 298-299 (1997). Jurisdiction should be granted by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

PRAYER

Petitioner prays that this Court:

1. Issue a Writ of Certiorari to the Tenth Circuit Court of Appeals.

2. Hold that federal jurisdiction existed in the U.S. District Court in this matter under 28 U.S.C. § 1331.

3. Hold that the U.S. District Court and the Tenth Circuit Court of Appeals should have granted jurisdiction for Petitioner's § 1983 suit under the *Ex Parte Young* doctrine criteria enumerated by this Court.

4. Hold that the U.S. District Court and the Tenth Circuit Court of Appeals improperly applied the *Rooker-Feldman* doctrine in this matter.

5. Grant jurisdiction and remand the case for adjudication on the merits.

6. Award Petitioner his court costs and attorney fees.

Respectfully submitted,

ROBERT SIMON, ESQ.
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505-831-9600
Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RONNIE J. GARNER,

Plaintiff-Appellant,

v.

STEPHANIE GONZALES, Director, Child Support Enforcement Division, New Mexico; PAMELA S. HYDE, Secretary, Human Services Department, New Mexico; JAMES LOUGHREN, Former Judge and current CSEB Hearing Officer, 2nd Judicial District, New Mexico; IRA ROBINSON; MICHAEL D. BUSTAMANTE; MICHAEL E. VIGIL, Judge, Appeals Court, New Mexico,

Defendants-Appellees.

No. 05-2096
(D.C. No. CIV-04-1314 RHS/ACT)
(D. N.M.)

ORDER AND JUDGMENT*

(Filed Feb. 2, 2006)

Before **BARRETT**, **PORFILIO**, and **BRORBY**, Senior Circuit Judges.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff appellant is a divorced father whose divorce was administered through the New Mexico state court system. According to the complaint, defendants are the Director of the New Mexico Child Support Enforcement Division, the Secretary of the New Mexico Human Services Department, the trial judge who presided over plaintiff's divorce, and the three judges of the New Mexico Court of Appeals who ruled against plaintiff in his divorce appeal. App. at 10-12.

Plaintiff's complaint alleges that defendants violated his rights under the Fifth and Fourteenth Amendments to the Constitution and failed to follow federal law relative to child support. Plaintiff requests declarative and injunctive relief pursuant to 42 U.S.C. § 1983 to remedy the alleged violations of federal law. The district court, without discussion or analysis, dismissed the case with prejudice.

On appeal, plaintiff argues that it was error to dismiss this case under either Fed. R. Civ. P. 12(b)(1) or 12(b)(6), and that, in any event, it was error to dismiss with prejudice. We have conducted a de novo review of the record and the parties' briefs, *see Kiowa Indian Tribe v. Hoover*, 150 F.3d 1163, 1165 (10th Cir. 1998), and agree with defendants that this case had to be dismissed on any number of grounds for want of subject matter jurisdiction.

The clearest ground for dismissal of this matter was on the basis of the *Rooker-Feldman* doctrine.[1]

> [T]he *Rooker-Feldman* doctrine prohibits a lower federal court from considering claims actually decided by a state court, and claims inextricably intertwined with a prior state-court judgment. In other words, *Rooker-Feldman* precludes a party losing in state court . . . from seeking what in substance would be appellate review of [a] state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights.

Kenmen Eng'g v. City of Union, 314 F.3d 468, 473 (10th Cir. 2002) (citations and quotations omitted). "[I]n the Tenth Circuit, *Rooker-Feldman* applies to *all* state court judgments, including those of intermediate state courts." *Id.*

In determining whether an action presents a case "inextricably intertwined" with the state court judgment, "we must ask whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment." *Id.* at 476 (quotation omitted). "In other words, we approach the question by asking whether the state-court judgment caused, actually and proximately, the injury for which the federal-court plaintiff seeks redress. If it did, *Rooker-Feldman* deprives the federal court of jurisdiction." *Id.* (emphasis omitted). Plaintiff's complaint runs afoul of *Rooker-Feldman* both because it asks the federal court to consider claims actually decided

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[1] The doctrine takes its name from the seminal decisions in *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983) and *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923).

by the New Mexico courts and because it includes claims inextricably intertwined with the judgments of the state court.[2]

After plaintiff's divorce proceeding was final in state district court, he appealed to the New Mexico Court of Appeals. That court ruled against him on most of the issues he included in his federal complaint.[3] To wit, it rejected plaintiff's arguments that he was denied due process because he was not given a hearing to determine whether his former wife was underemployed and to present evidence rebutting the amount of child support set by state guidelines. App. at 46-50. That court also rejected plaintiff's contention that federal law preempts New Mexico's child support guidelines. *Id.* at 50-52. To the extent plaintiff raises issues that could be seen as distinct from those actually decided by the New Mexico Court of Appeals, we hold those issues to be "inextricably intertwined" with the underlying state court judgments and therefore barred from federal court by *Rooker-Feldman.* Plaintiff's request for prospective and injunctive relief is simply a reformulated request for a judgment that the state court violated his rights in the past. A lower federal court has no jurisdiction over such a matter. *See Kiowa Indian Tribe,* 150 F.3d at 1169.

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[2] The recent clarification by the Supreme Court of the scope of *Rooker-Feldman* in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005), does not affect the outcome of this case.

[3] The United States Supreme Court also denied certiorari. *Garner v. Garner,* No. 23,761, slip op. (N.M. Ct. App. June 6, 2003), *cert. denied,* 72 U.S.L.W. 3328 (U.S. Jan. 12, 2004) (No. 03-663).

As for his second point of error, we agree with plaintiff that the district court erred in dismissing his complaint with prejudice. As explained by the Seventh Circuit,

> "[t]he *Rooker-Feldman* doctrine is a rule of federal jurisdiction. A suit dismissed for lack of jurisdiction cannot *also* be dismissed "with prejudice"; that's a disposition on the merits, which only a court with jurisdiction may render. "No jurisdiction" and "with prejudice" are mutually exclusive. When the *Rooker-Feldman* doctrine applies, there is only one proper disposition: dismissal for lack of federal jurisdiction. A jurisdictional disposition is conclusive on the jurisdictional question: the plaintiff cannot re-file in federal court. But it is without prejudice on the merits, which are open to review in state court to the extent the state's law of preclusion permits."

Frederiksen v. City of Lockport, 384 F.3d 437, 438 (7th Cir. 2004); *see also Brereton v. Bountiful City Corp.*, ___ F.3d ___, No. 05-4067, 2006 WL 182063, at *2 (10th Cir. Jan. 26. 2006) (noting that dismissals for lack of jurisdiction must be without prejudice).

The state agency defendants complain that they were unable to find a copy of plaintiff's petition for certiorari to the United States Supreme Court and ask for sanctions against plaintiff for failure to provide all relevant documents in his appendix. The request for sanctions is denied. The certiorari petition is available online. *See* 2003 WL 22574929. In addition, all defendants request sanctions for what they deem a frivolous appeal. These requests are also denied because they were not made in the form of separate motions as required by Fed. R. App. P. 38. Judge Harris L Hartz has recused himself from this matter.

The judgment of the district court is MODIFIED to reflect that the dismissal of all claims asserted in this action is without prejudice, and, as so modified, the judgment is AFFIRMED.

Entered for the Court

John C. Porfilio
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

RONNIE J. GARNER,

Plaintiff,

vs.

STEPHANIE GONZALES, Director, Child Support Enforcement Division, New Mexico, PAMELA S. HYDE, Secretary, Human Services Department, New Mexico, JAMES LOUGHREN, Former Judge 2nd Judicial District currently a CSEB hearing Officer, 2nd Judicial District, 2nd JUDICIAL DISTRICT, New Mexico, IRA ROBINSON, Judge, Appeals Court, New Mexico, MICHAEL D. BUSTAMANTE, Judge, Appeals Court, New Mexico, MICHAEL E. VIGIL, Judge, Appeals Court, New Mexico,

Defendants.

Civ. No. 04-1314 RHS/ACT

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT

THIS MATTER having come before the Court on Defendants' Motion to Dismiss Complaint [docket no. 2] and the Court having now considered the pleadings on file in the above captioned cause together with the arguments and authorities propounded by the respective parties, and being otherwise fully advised in the premises;

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss Complaint [docket no. 2] is hereby GRANTED and the above captioned cause is hereby dismissed with prejudice.

IT IS FURTHER ORDERED that the parties shall bear the respective attorney's fees and costs.

/s/ Robert Hayes Scott
ROBERT HAYES SCOTT
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RONNIE J. GARNER,

Plaintiff-Appellant.,

v.

STEPHANIE GONZALES, Director, Child Support Enforcement Division, New Mexico; PAMELA S. HYDE, Secretary, Human Services Department, New Mexico; JAMES LOUGHREN, Former Judge and current CSEB Hearing Officer, 2nd Judicial District, New Mexico; IRA ROBINSON; MICHAEL D. BUSTAMANTE; MICHAEL E. VIGIL, Judge, Appeals Court, New Mexico,

Defendants-Appellees.

No. 05-2096

ORDER

Filed February 28, 2006

Before, **BARRETT, PORFILIO,** and **BRORBY,** Senior Circuit Judges

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Appellant's petition for rehearing is denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: /s/ [Illegible]
Deputy Clerk

42 U.S.C. § 667. State guidelines for child support awards

(a) Establishment of guidelines; method

Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts.

(b) Availability of guidelines; rebuttable presumption

(1) The guidelines established pursuant to subsection (a) of this section shall be made available to all judges and other officials who have the power to determine child support awards within such State.

(2) There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

(c) Technical assistance to States; State to furnish Secretary with copies

The Secretary shall furnish technical assistance to the States for establishing the guidelines, and each State shall furnish the Secretary with copies of its guidelines.

45 C.F.R. § 302.56 Guidelines for setting child support awards.

(a) Effective October 13, 1989, as a condition of approval of its State plan, the State shall establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support award amounts within the State.

(b) The State shall have procedures for making the guidelines available to all persons in the State whose duty it is to set child support award amounts.

(c) The guidelines established under paragraph (a) of this section must at a minimum:

(1) Take into consideration all earnings and income of the noncustodial parent;

(2) Be based on specific descriptive and numeric criteria and result in a computation of the support obligation; and

(3) Provide for the child(ren)'s health care needs, through health insurance coverage or other means.

(d) The State must include a copy of the guidelines in its State plan.

(e) The State must review, and revise, if appropriate, the guidelines established under paragraph (a) of this section at least once every four years to ensure that their application results in the determination of appropriate child support award amounts.

(f) Effective October 13, 1989, the State must provide that there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child

support, that the amount of the award which would result from the application of the guidelines established under paragraph (a) of this section is the correct amount of child support to be awarded.

(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that the application of the guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.

(h) As part of the review of a State's guidelines required under paragraph (e) of this section, a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines. The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited.

(Approved by the Office of Management and Budget under control number 0960-0385)

05-2096

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RONNIE J. GARNER,
Appellant/Petitioner

vs.

STEPHANIE GONZALES
PAMELA S. HYDE
JAMES LOUGHREN
IRA ROBINSON
MICHAEL D. BUSTAMANTE,
MICHAEL E. VIGIL
Appellees/Defendants

On Appeal from the United States District Court
For the District of New Mexico

The Honorable Robert Hayes Scott
District Magistrate Judge

D. C. No. 04-CV-1314

PETITION FOR PANEL REHEARING

Respectively submitted,

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REQUEST FOR HEARING

Counsel does not request an en banc hearing for this petition.

TABLE OF CONTENTS

STATEMENT REGARDING REHEARING i

TABLE OF AUTHORITIES iii

PRIOR OR RELATED APPEALS iv

JUSTIFICATION FOR REHEARING 1

ARGUMENT 3

I. THIS CASE DOES NOT SEEK TO MODIFY, ALTER OR REVERSE ANY PREVIOUS STATE COURT DECISION 3

DISCUSSION 3

II. REVIEW OF A PREVIOUS STATE COURT DECISION FOR DETERMINATION OF A FEDERAL QUESTION IS ALLOWED BY BOTH THE U.S. SUPREME COURT AND 10TH CIRCUIT CASE LAW 6

DISCUSSION 6

III. NEW MEXICO STATE ACTORS, INCLUDING JUDGES, FAIL TO ACKNOWLEDGE THE SUPREMACY OF FEDERAL LAW IN CHILD SUPPORT ENFORCEMENT 8

DISCUSSION 8

IV. APPLICATION OF THE ROOKER-FELDMAN DOCTRINE IN THIS CASE IS ERROR 9

DISCUSSION 9

SUMMARY OF ARGUMENT 10

PRAYER 13

CERTIFICATE OF COMPLIANCE 13

CERTIFICATE OF SERVICE 14

AUTHORITIES

CASE PAGE

CAPRA v. Sullivan, 787 F.Supp 724 (6th Cir. 1991) 2

CAPRA v. Sullivan, 787 F.Supp 738 (6th Cir. 1992) 2

Clafin v. Houseman, 93 U.S. 130 (1876) 2

David Derringer v. New Mexico Supreme Court 9
Civ. No. 02-1075 (D.N.M. December 22, 2003)

Dist. Of Columbia Ct. of App. v. Feldman, 460 U.S. 462 (1983) 9

Douglas v. New York, N.D. & H.R. Co., 279 U.S. 377 (1929) 2

Felder v. Casey, 487 U.S. 131 (1988) 2

Howlett by and through Howlett v. Rose, 496 U.S. 356 (1990) 2

Kenmen Engineering v. City of Union 10
314 F.3d 468 (10th Cir. 2002)

Kiowa Indian Tribe of Oklahoma v. Hoover, 150 F.3d 1163 (10th Cir. 1998) 3, 7, 10

Leeder v Leeder, 118 N.M. 603 (1994) 1

Mondou v. New York, N.H. & HR. Co., 223 U.S. 1, 57 (1912) 2

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) 6, 7, 9, 10

STATUTES

U.S. Constitution, Amendment XIV, Section 1 11

U.S. Constitution, Article 1, Section 8, Clause 1 2

Child Support Enforcement Program, Chapter 7, Subchapter IV Part D, 42 U.S.C. §§ 651-669 (2000) 1, 2, 8, 9

42 U.S.C. § 1983 (2000) 4

REGULATIONS

45 C.F.R. § 302.56 (2004) 1

PRIOR OR RELATED APPEALS

There are no prior or related appeals in this matter.

JUSTIFICATION FOR PANEL REHEARING

American citizens have great respect for federal law because they believe that federal law will be consistently and uniformly applied across all states and that there will be no violation of due process for litigants under applicable federal law. This should apply equally to child support litigants.

However, New Mexico has a long history of ignoring federal child support statutes, specifically 42 U.S.C. §§ 651-669 and implementing regulations, such as 45 C.F.R. § 302.56 (2004). Appellant has identified at least six areas of the Child Support Enforcement Program, Chapter 7, Subchapter IV Part D, 42 U.S.C. §§ 651-669 that conflict with the application of New Mexico law by New Mexico state officials (see Appellant's Appendix, A-34). Even New Mexico's Appellate courts have violated federal law. *Leeder*

v Leeder, 118 N.M. 603 (1994) held that New Mexico's statutory presumptive guidelines are irrebutable and this decision is in direct conflict with 42 U.S.C. § 667(b)(2). The decision in *Leeder v Leeder,* supra, is still current law in New Mexico and is used routinely and denies New Mexico litigants their due process rights in New Mexico that should be protected by federal law.

Appellant requests the panel to consider whether its decision in this matter ensures that there will be equitable federalism if New Mexico does not properly apply the Child Support Enforcement Program, Chapter 7, Subchapter IV Part D, 42 U.S.C. §§ 651-669 as enacted under the Spending Powers of the U.S. Constitution, Article 1, Section 8, Clause 1. If the panel's decision allows New Mexico state actors, including judges, to continue to violate federal law, then New Mexico is at variance with numerous U.S. Supreme Court decisions that all state officials and judges are required to uphold and enforce applicable federal law. (see *Clafin v. Houseman,* 93 U.S. 130 (1876), *Douglas v. New York, N.D. & H.R. Co.*, 279 U.S. 377 (1929), *Mondou v. New York, N.H. & H.R. Co.,* 223 U.S. 1 (1912), *Felder v. Casey,* 487 U.S. 131 (1988), *Howlett by and through Howlett v. Rose,* 496 U.S. 356 (1990))

Appellant requests the panel to determine if its decision is also at variance with rulings from other federal districts that decided that 42 U.S.C. 651-669 is applicable to all child support litigants (see *CAPRA v. Sullivan,* 787 F.Supp 724 (6th Cir. 1991) and *CAPRA v. Sullivan,* 787 F.Supp 738 (6th Cir. 1992).

The panel should determine whether it applied the Rooker-Feldman Doctrine inappropriately to a case that

seeks only prospective relief; particularly when the requested prospective relief does not alter, change, or reverse the previous state court decision. Also, no monetary award or fines were requested. Based on the facts of this case, the application of the Rooker-Feldman Doctrine conflicts with the 10th Circuit's own precedents and standards for applying the Rooker-Feldman Doctrine (see *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163 (10th Cir. 1998)).

If the panel inappropriately applied the Rooker-Feldman Doctrine, the federal Court has denied itself the opportunity to address continued violations of federal law by state officials, including judges, acting under color of state law. This Petition for Panel Rehearing is filed to allow the panel to review whether it ignored its own standards for applying the Rooker-Feldman Doctrine and, by doing so, denied itself an opportunity to address the issues of violation of federal law by New Mexico state officials acting under color of state law raised in Appellant's Complaint (See "Argument", Issue I, below).

ARGUMENT

I. THIS CASE DOES NOT SEEK TO MODIFY, ALTER OR REVERSE ANY PREVIOUS STATE COURT DECISION

Appellant's initial statement in Plaintiff's "COMPLAINT FOR VIOLATION OF CIVIL RIGHTS AND FOR DECLARTORY [sic] AND INJUNCTIVE RELIEF" filed November 22, 2004 (Appellant's Appendix, A-8) states:

> "This is an 42 U.S.C. § 1983 action for prospective declaratory and injunctive relief to declare Plaintiff's rights and to remedy violations of federal law

by two state officers and three current judges and one former judge and current CSEB hearing officer. Plaintiff does not seek to overturn or invalidate any previously adjudicated court decision in New Mexico."

Appellant's COMPLAINT (Appellant's Appendix, A-35 to A-37) then requested the following relief:

1. Declare that New Mexico's laws are defective and that Defendants violated Plaintiff's rights under IV-D statutes and implementing regulations by failing to review child support award amounts every four years and/or failing to use current economic data for the cost of raising children in New Mexico or other sources of economic data for the review of child support guideline award amounts.

2. Declare that New Mexico's laws are defective and that Defendants violate Plaintiff's rights under IV-D statutes and implementing regulations by failing to allow rebuttal of the presumptive child support guideline award amount.

3. Declare that New Mexico's laws are defective and that Defendants violate Plaintiff's rights under IV-D statutes and implementing regulations by failing to allow Plaintiff a hearing to present evidence in child support adjudication.

4. Declare that New Mexico's laws are defective and that Defendants violate Plaintiff's rights under IV-D statutes and implementation regulations by failing to provide precise and reasonable criteria in New Mexico's statutes such that the intent and obligations of federal law are followed for child support adjudication.

5. Declare that New Mexico's laws are defective and that Defendants violated Plaintiff's rights under IV-D statutes and implementing regulations by using child support guideline award amounts that or not based on scientific principles and current economic data.

6. Declare that New Mexico's laws are defective and that Defendants violated Plaintiff's procedural and substantive due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.

7. Declare that under Congress' Spending Powers that federal law preempts New Mexico statutes and court decisions that do not precisely comply with federal child support enforcement law and regulation.

8. Grant Plaintiff injunctive relief under 42 U.S.C. § 1983 if declaratory relief is not available against Defendants Loughren, Robinson, Vigil and Bustamante.

9. Enter a permanent injunction to require state officials and employees in New Mexico to comply with federally mandated procedures.

10. Enter a permanent injunction to require that New Mexico develop child support awards that are based on current and scientifically provable data.

11. Enter a permanent injunction to require that when New Mexico amends its child support enforcement statute NMSA 1978 § 40-4-11, that any amendment is sent for review to the Federal Child Support Enforcement Office to ensure the amendment does not violate federal law.

12. Award Plaintiff reasonable attorney's fees and cost; and

13. Award such other relief as this Court deems just and proper.

This panel should take notice that in no instance does Appellant request the prior court decision be modified, altered, or reversed and that Appellant requested no fines or other financial remuneration and there is no request for relief that would alter any previous state court decision. Appellant requested only items related to prospective relief. Therefore, no relief requested by Appellant justified application of the Rooker-Feldman Doctrine.

II. REVIEW OF A PREVIOUS STATE COURT DECISION FOR DETERMINATION OF A FEDERAL QUESTION IS ALLOWED BY BOTH THE U.S. SUPREME COURT AND 10TH CIRCUIT CASE LAW

The panel, in its decision, made reference to the fact that Appellant wanted to review the prior state court decisions and implied that this was prohibited. However, the U.S. Supreme Court held in *Pennzoil Co. v Texaco, Inc.*, 481 U.S. 1 (1987) at 21 that review of a state court decision for determination of a federal question is permissible and is not "inextricably intertwined" merely because the action requires some consideration of the merits of a state court decision. Appellant "reviewed" the previous state court decision to document violations of federal law for inclusion in Plaintiff's COMPLAINT. Appellant requests the panel to reassess its position that any review of the previous state court decision is prohibited, even when the requested relief would not overturn, alter, or modify the state court decision. If saying that reference to a prior state court decision to illustrate violations of federal law

by state court officers raises the Rooker-Feldman Doctrine, then the Rooker-Feldman Doctrine would invariably create a trap for every federal plaintiff who references violations of federal law or due process in prior state court decisions relating to the litigant.

This Court has previously held that review of a previous state court decision is allowed. The 10th Circuit case of *Kiowa Indian Tribe of Oklahoma v Hoover,* 150 F.3d 1163 (10th Cir. 1998), referencing the holding in *Pennzoil Co. v Texaco, Inc.,* 481 U.S. 1 (1987), reversed the District Court's dismissal on the basis of jurisdiction, stating:

> "Although the Tribe's § 1983 action necessarily implicated the state court judgments in *Hoover* and *Aircraft Equip. I,* on its face, the tribe's complaint clearly states a separate and distinct claim. . . ."

The 10th Circuit decision in *Kiowa Indian Tribe of Oklahoma v Hoover*, 150 F.3d 1163 (10th Cir. 1998), thus set a precedent for review of previous state court decisions for determination of a federal question and followed the Supreme Court decision in *Pennzoil Co.* that permits review of previous state court decisions. Yet, even though the 10th Circuit established that a previous state court decision can be reviewed to determine a federal question, the panel failed to apply this standard to this case.

It also seems that the panel disregarded the fact that Appellant's Complaint was based upon six federal issues, all of which relate to failure of New Mexico state officials, including judges, to apply, uphold and acknowledge federal child support law, 42 U.S.C. §§ 651-669 (see Appellant's Appendix, A-34). One must wonder why the panel is looking for a procedural defect in order to dismiss this case

when the Complaint clearly identifies six compelling federal issues.

III. NEW MEXICO STATE ACTORS, INCLUDING JUDGES, FAIL TO ACKNOWLEDGE THE SUPREMACY OF FEDERAL LAW IN CHILD SUPPORT ENFORCEMENT

The state actor judges stated in their New Mexico Court of Appeals opinion (Appellant's Appendix, A-51, lines 6-7) that:

> "The federal regulations touch on the subject of child support but they do not preempt the field"

And they further stated (Appellant's Appendix, A-51, lines 11-14):

> "Respondent's memorandum cites to federal regulations that discuss the matter of child support very generally, but we see nothing in those regulations that require us to hold that they preempt state law"

The regulations referenced by the New Mexico state actors in the above quotes are the entire federal law for Child Support Enforcement, 42 U.S.C. §§ 651-669, that encompasses hundreds of pages with very specific requirements that state officials, including judges, are required to follow, uphold and apply to child support cases in New Mexico. Yet, the defendant New Mexico Court of Appeals judges in this matter refused to acknowledge that federal child support law apply in New Mexico. The refusal by state actors to act in accordance with federal law should be of great concern to this panel and Appellant requests whether this constitutes a federal question.

IV. APPLICATION OF THE ROOKER-FELDMAN DOCTRINE IN THIS CASE IS ERROR

The relevant 10th Circuit cases do not support application of the Rooker-Feldman Doctrine in this case. The most succinct summary that Appellant has seen in the 10th Circuit is Chief Judge Vasquez's discussion of the Rooker-Feldman Doctrine in *David Derringer v New Mexico Supreme Court*, Civ. No. 02-1075 (Consolidated with Civ. No. 03-0090) (Dist N.M. December 22, 2003), in which Chief Judge Vasquez discusses the holding and reasoning of *Dist. Of Columbia Ct of App. v Feldman*, 460 U.S. 462 and *Pennzoil Co v Texaco, Inc*, 481 U.S. 1 and explains how to determine when a case is "inextricably intertwined" for purposes of a motion to dismiss. Chief Judge Vasquez farther states:

> "If adjudication of the claim would require the federal court to determine that a state court judgment was erroneously entered and was void, the claim is inextricably intertwined with the merits of the state court judgment."

The Tenth Circuit case, *Kenmen Engineering v City of Union*, 314 F.3d 468 (10th Cir. 2002) at 476 also states:

> "In conducting the analysis, we must pay close attention to the relief sought by the federal-court plaintiff. If future relief is sought, then Rooker-Feldman does not apply."

SUMMARY OF ARGUMENT

It is clear from Appellant's complaint that:

1. Only prospective relief is requested.

2. The prospective relief requested does not overturn, alter, modify or invalidate the previous state court decision.

3. Supreme Court decisions such as *Pennzoil Co. v Texaco, Inc* and 10th Circuit cases such as *Kiowa Indian Tribe of Oklahoma v Hoover* allow review of state court decisions to determine a federal question and such review does not mandate an automatic application of the Rooker-Feldman Doctrine such as happened in this ease. Rather, the panel failed to look at the requested relief and analyze whether the requested relief would reverse, alter, or modify the previous state court judgment. Thus the Rooker-Feldman Doctrine was improperly applied by the District Court in this case.

4. Analysis of case law in the 10th Circuit indicates that the application of the Rooker-Feldman Doctrine to deny jurisdiction was error in this case.

5. The refusal by this panel to address violations of federal law by New Mexico State officials, including judges, perpetuates violation of federal law in New Mexico, violates the concept of equitable federalism and violates the due process rights of child support litigants under the Fourteenth Amendment of the U.S. Constitution. These violations of federal law by New Mexico state actors constitute continuing federal questions that support federal jurisdiction even though the basis for the federal questions arise out of the state court decisions.

Appellant filed his COMPLAINT because New Mexico state actors continue to disregard federal law requirements enacted to protect child support litigants' due process rights. In no other area of federal or state law does

there appear to be such a dearth of due process protection by New Mexico actors. Because the federal laws enacted to protect due process are ignored by New Mexico courts, there is a distain and disinterest for litigants created and a tendency by all state child support officials to dismiss litigants' due process claims as frivolous and unimportant. Child support litigants have morphed into a class of litigants with diminished due process rights. Even the state actor defendants in this case have portrayed these issues as frivolous, unimportant, and not worthy of consideration by this federal court. One must wonder whether the distain and disinterest in the due process rights of child support litigants in the New Mexico court system will be ignored by the federal courts; and, if so, who, other than this panel, will protect the due process rights under federal law for New Mexico litigants.

One must also wonder why clearly identified violations of federal law by New Mexico state actors, including judges, merit so little interest by a federal court that is mandated to uphold applicable federal law.

PRAYER

Appellant prays that the Court grant its Petition for Panel Rehearing and find that jurisdiction exists in the federal courts because the Rooker-Feldman Doctrine does not apply and because Appellant's Complaint raises compelling federal issues that require adjudication in federal court.

Respectfully Submitted,

/s/ Robert S. Simon
Robert S. Simon

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. 32(a)(7)(C), I certify that this Petition for Panel Rehearing is proportionally spaced and contains 3,103 words. I relied on my word processor to obtain the count and it is Microsoft Word 2003 for windows.

I further certify that the information in this Certificate of Compliance is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Robert S. Simon
Robert S. Simon

CERTIFICATE OF SERVICE

I, Robert S. Simon, certify that two copies of Appellant's Petition for Panel Rehearing were served on each of the following:

Paul R. Ritzma, Esq.
P.O. Box 2348
Santa Fe, N.M. 87504

David K. Thomson, Esq.
P.O. Drawer 1508
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by Federal Express and that the file copies of Appellant's Petition for Panel Rehearing were dispatched to the Circuit Clerk by first class mail on this 14th day of February, 2006.

/s/ Robert S. Simon
Robert S. Simon

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

RONNIE J. GARNER,

Plaintiff

vs

STEPHANIE GONZALES, Director, Child Support Enforcement Division, New Mexico
PAMELA S. HYDE, Secretary, Human Services Department, New Mexico
JAMES LOUGHREN, Former Judge, 2nd Judicial District, New Mexico, currently a CSEB Hearing Officer, 2nd Judicial District, New Mexico
IRA ROBINSON, Judge, Appeals Court, New Mexico
MICHAEL D. BUSTAMANTE, Judge, Appeals Court, New Mexico
MICHAEL E. VIGIL, Judge, Appeals Court, New Mexico

Defendants

No. CIV-04-1314

DEMAND FOR JURY TRIAL

COMPLAINT FOR VIOLATION OF CIVIL RIGHTS AND FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed Nov. 22, 2004)

INTRODUCTORY COMMENT

1. This is a 42 U.S.C. § 1983 action for prospective declaratory and injunctive relief to declare Plaintiff's rights and to remedy violations of federal law by two

state officials and three current judges and one former judge and current CSEB Hearing Officer. Plaintiff does not seek to overturn or invalidate any previously adjudicated court decision in New Mexico. Plaintiff is aware that such request would violate res judicata and/or the Rooker-Feldman Doctrine. Plaintiff brings this action against defendant judges with great reluctance, only as a last resort, and only because in the matter of divorce and custody in New Mexico, the constitutional rights of a parent to rebut the statutorily presumptive child support award and to ensure that the child support award is based on current and appropriate child rearing data is abrogated and this violates federal law and the Plaintiff's constitutional rights under the fifth and fourteenth Amendments of the U.S. Constitution. Plaintiff seeks no damages against any of the named Defendants. Plaintiff is aware that judges have absolute immunity for their judicial decisions, even if the decisions violate the civil rights of a particular litigant in a previously adjudicated court decision, as in Plaintiff's New Mexico case. However, state judges at any level are not immune from declaratory relief or injunctive relief (if no declaratory relief is available) under a 42 Section 1983 action to prevent future violations of civil rights by New Mexico's state officials or employees in similar or identical circumstances as Plaintiff's case. Plaintiff turns to the federal courts because in the matter of federal constitutional rights, the federal courts remain the last bastion to ensure that states, at any level, whether administrative or judicial, do not violate the constitutional rights of a U.S. citizen and to ensure that there is equitable federalism for citizens of all states and to ensure that cooperative federalism is properly applied in New Mexico under federal law and implementing regulations. Additionally, Plaintiff has exhausted all other state remedies.

The defendants in this action violated applicable federal law under 42 U.S.C. §§ 651, et seq. and federal implementing regulations, 45 C.F.R. § 302.56. New Mexico's laws are defective and do not conform to federal law and are not judicially enforced in conformity with federal law and regulations, which results in deprivation of individual private rights and property rights.

Plaintiff offers multiple examples of civil rights violations and violations of federal law for review only to demonstrate that fixture litigants in New Mexico will face similar or identical civil rights violations and/or violations of federal law and to provide support for the need for a declaratory judgment and injunctive relief and to foreclose a motion for summary judgment for "lack of evidence".

Plaintiff seeks declaratory and injunctive relief to remedy a pervasive and systemic failure of Defendants to adhere to federal law and to acknowledge that failure to follow federal mandates denies Plaintiff equitable federalism. Plaintiff seeks numerous declarations related to violations of federal law and civil rights violations, as well as a declaration that federal law preempts when a state voluntarily accepts funds for operation of a state child support program enacted by Congress' Spending Powers under the U.S. Constitution, Article 1, Section 8, Clause 1.

Plaintiff believes that relief is constitutionally required because the U.S. Constitution prohibits a state from denying any person within its jurisdiction the equal protection of federal law. No alternative state remedies are available and irreparable harm will occur if relief is not granted by this court.

JURISDICTIONAL BASIS

2. Plaintiff Garner claims federal jurisdiction pursuant to Article III Section 2 that extends the jurisdiction to cases arising under the U. S. Constitution.

3. Plaintiff Garner brings this suit pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 1983, 42 U.S.C. § 1988, 28 U.S.C. § 2201, and 28 U.S.C. § 2202 for violations of certain protections, guaranteed to him by the Fifth and Fourteenth Amendments of the U. S. Constitution, by Defendants acting under color of state law in their official capacities.

4. The actions contained herein occurred in New Mexico and venue is therefore proper and otherwise appropriate.

PARTIES:

PLAINTIFF

5. Plaintiff, Ronnie J. Garner, is a natural person residing at 14021 Wind Mountain Rd, NE, Albuquerque, New Mexico, in Bernalillo County.

6. Plaintiff has been irreparable injured by Defendants.

DEFENDENTS

7. Defendant Stephanie Gonzales is the Director of New Mexico's Child Support Enforcement Division (CSED) and is responsible for all administration, policy, budgeting, and personnel matters for CSED, including New Mexico's participation in federally mandated child support enforcement, under Title 42, Chapter 7, Subchapter IV, Part D, Child Support Enforcement (herein referred to as "IV-D"). Defendant Gonzales is responsible for ensuring CSED complies with federal law and specifically with IV-D.

8. Defendant Pamela S. Hyde, is the Secretary of New Mexico's Human Services Department (HSD) and administers New Mexico's participation in the federally funded Temporary Assistance for Needy Families (herein referred to as TANF) and the portions of TANF that mandates compliance with IV-D. Defendant Hyde is ultimately responsible for ensuring HSD is operated in conformity with federal law for TANF and IV-D.

9. Defendant James Loughren is a former state district court judge in the 2nd Judicial District of New Mexico, and a current CSEB Hearing Officer in the 2nd Judicial District, and was the presiding judge in the matter of *Garner vs. Garner*, DR89-04112 when the initial violation of federal law occurred. Judge Loughren signed a Minute Order, dated 12-1-2002 (**Exhibit-1, Minute Order**) that approved the Arbitrator's Decisions that included a presumptive amount of child support based on New Mexico's statutory presumptive child support guidelines without ever having provided Plaintiff a hearing and an opportunity to call expert witnesses, or any opportunity to file briefs to establish that the child support award was correct and appropriate or an opportunity to rebut the Arbitrator's decisions.

   Judge Loughren misrepresented in the Minute Order that he had heard arguments of counsel, implying there was a hearing. The official Case History in *Garner vs. Garner*, supra (**Exhibit 2, Case History, *Garner v Garner***) lists no briefs filed and no hearing set to establish whether the child support award was correct or appropriate or to consider Plaintiff's Objections timely filed to the Arbitrator's Decisions that included the presumptive child support award amount as required by rule of Civil Procedure of the District Courts 1-053 NMSA 1978. This denied Plaintiff's due process rights under the Fifth and

Fourteenth Amendments of the U. S. Constitution and violated federal law, 42 U.S.C. §§ 651 et. seq., and particularly 42 U.S.C. § 667 and federal implementing regulation, 45 C.F.R. § 302.56.

10. Defendants Ira Robinson, Michael D. Bustamante, and Michael Vigil, are judges on the State of New Mexico Court of Appeals who collectively issued a Memorandum Opinion dated June 6, 2003 (**Exhibit 3, Memorandum Opinion**) in Plaintiff's appeal of Judge Loughren's Minute Order of 12-1-2002. The Memorandum Opinion ignored the Case History (**Exhibit 2, Case History, *Garner v Garner***), and erroneously held that Plaintiff had been heard (**Exhibit 3, Memorandum Opinion, page 6-7**). The ruling by Defendants further denied Plaintiff an opportunity to be heard or to rebut the child support award amount. Defendants Robinson, Bustamante, and Vigil violated federal law, 42 U.S.C. § 667(b)(2) (**Exhibit 4, 42 U.S.C. Section 667**) when they denied Plaintiff an opportunity to rebut New Mexico's Child Support Guideline Award amount or to be otherwise heard and violated Plaintiff's rights under the Fifth and Fourteenth Amendments of the U. S. Constitution.

Defendants Robertson, Bustamante, and Vigil also failed to acknowledge that a previous New Mexico Appeal Court's decision, *Leeder vs. Leeder*, 118 N.M. 603 (1994), conflicts with 42 U.S.C. § 667(b)(2) and violates federal law. Defendants did not respond to this issue in their Memorandum Decision even though this was raised by Plaintiff in his *Docketing Statement* and Plaintiff's *Appellant's Memorandum in Response to Proposed Summary Disposition of March 3, 2003* (**Exhibit 5, Plaintiff's *Docketing Statement*, page 18-19 and Exhibit 6, Plaintiff's *Appellant's Memorandum in Response to Proposed Summary Disposition of March 3, 2003*, pages 15 & 28**). *Leeder vs. Leeder*, supra, denies any

child support litigant in New Mexico the opportunity to rebut the presumption of New Mexico's child support guideline award amount when it held on page 605 *"We conclude that the guidelines are presumed to provide the proper amount of Child Support and that Section 40-4-11(A)(?) is ordinarily satisfied if the court sets forth the computations (***6) made under the guidelines". Leeder vs* Leeder, supra, conflicts with federal law, 42 U.S.C. § 667(b)(2) and violates Plaintiff's rights under the Fifth and Fourteenth Amendments of the U. S. Constitution and should be declared in violation of federal law.

Defendants Robertson, Bustamante, and Vigil also violated federal law when they ruled against federal preemption of New Mexico's Child Support statutes under Congress' Spending Powers, U. S. Constitution, Article 1, Section 8, Clause 1. (**Exhibit 3, Memorandum Opinion, page 11**).

PLAINTIFF FOR HIS COMPLAINT STATES:

11. Plaintiff seeks a declaration that Defendants Gonzales and Hyde operate a IV-D program in New Mexico, enacted under Congress' Spending Powers, that violates Plaintiff's rights under the Fifth and Fourteenth Amendments to the United States Constitution and federal Law, 42 U.S.C. §§ 651, et. seq., as protected by 42 U.S.C. § 1983.

12. Plaintiff Garner seeks a declaration, or injunctive relief if no declaratory judgement is available, that Defendant Loughren violated Plaintiff's rights, under the Fifth and Fourteenth Amendments of the U.S. Constitution and failed to follow federal law, 42 U.S.C. §§ 651, et. seq. as protected by 42 U.SC. § 1983.

13. Plaintiff seeks a declaration, or injunctive relief if no declaratory relief is available, that Defendants

Robertson, Bustamante, and Vigil violated federal law and violated Plaintiff's rights under the Fifth and Fourteenth Amendments of the U.S. Constitution and when they failed to acknowledge that New Mexico's child support statutes 40-4-11.1 through 40-4-11.3 are preempted by federal law, 42 U.S.C. §§ 65I, et. seq. as protected by 42 U.S.C. § 1983.

14. Plaintiff seeks a declaration that New Mexico voluntarily participates in TANF and IV-D and that the funding is an entitlement made under Congress' Spending Powers, and that New Mexico is required to adhere precisely to the IV-D statutes, 42 U.S.C. §§ 651, et. seq. and the applicable regulations 45 C.F.R. § 302.56 as protected by 42 U.S.C. § 1983.

15. Plaintiff seeks a declaration that federal statutes and regulations promulgated under TANF and IV-D preempts New Mexico Child Support law and that New Mexico statutes and court decisions must not thwart the intent and obligation of federal law and applicable federal implementing regulations as protected by 42 U.S.C. § 1983.

16. Plaintiff Garner seeks injunctive relief directing Defendants Gonzales and Hyde to comply with 42 U.S.C. §§ 651, et. seq., specifically with § 667(a) (**Exhibit 4, 42 U.S.C. Section 667**) requiring that "*a state must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods. . . .* " "*The analysis must be used in the states review of the guidelines. . . .* ". Defendants Gonzales' and Hyde's failure to consider current economic data on the cost of rearing children in New Mexico violates Plaintiff's Fifth and Fourteenth Amendment rights under the U.S. Constitution as protected by 42 U.S.C. § 1983.

17. Plaintiff Garner seeks injunctive relief directing Defendants Gonzales and Hyde to comply with obligations under 42 U.S.C. §§ 651 et. seq., specifically with § 667(a), that requires participating states to review their statutory child support guideline award amounts every four (4) years to ensure that the states guideline child support award amount is appropriate. Defendants Gonzales and Hyde and their departments failed to review New Mexico's statutory guideline child support award amounts every four (4) years and violated Plaintiff's rights under the Fifth and Fourteenth Amendment of the U.S Constitution as protected by 42 U.S.C. § 1983.

18. Plaintiff seeks injunctive relief directing Defendants Gonzales and Hyde to comply with obligations under 42 U.S.C. §§ 651, et. seq., specifically with § 667(b)(2) (**Exhibit 4, 42 U.S.C. Section 667**) and 45 C.F.R. § 302.56 that require New Mexico's child support statutes to contain criteria to determine when the presumptive child support awards are correct and appropriate and that the criteria be objective, specific, precise and reasonable such that there is no barrier to proper adjudication of child support awards and such that New Mexico follows the intent and obligations of federal law and regulation that allows litigants and judges to rebut New Mexico's statutory presumptive child support award amount as protected by 42 U.S.C. § 1983.

19. Plaintiff seeks injunctive relief directing Defendants Gonzales and Hyde to comply with obligations mandated by 42 U.S.C. § 667(a) that the State of New Mexico must have a scientific basis for the Child Support Award amounts as protected by 42 U.S.C. § 1983.

20. Plaintiff seeks declaratory relief against defendant Loughren, or injunctive relief if declaratory relief is not available, to comply with 42 U.S.C. §§ 651, et. seq.

and not violate Plaintiff's Fifth and Fourteenth Amendment rights under the U.S. Constitution by providing a right to a hearing and to allow rebuttal of the presumptive statutory child support guideline award amount as mandated by 42 U.S.C. § 667(b)(2) as protected by 42 U.S.C. § 1983.

21. Plaintiff seeks declaratory relief against Defendants Robinson, Bustamante, and Vigil, or injunctive relief if no declaratory relief is available, requiring them comply with 42 U.S.C. §§ 651, et. seq. and specifically from violating Plaintiff's Fifth and Fourteenth Amendment rights to a hearing and the opportunity to rebut the child support guideline award amount as mandated by 42 U.S.C. § 667(b)(2) as protected by 42 U.S.C. § 1983.

22. At all material times, the Defendants acted under color of state law.

22. All the individual defendants are named and sued solely in their official capacities.

23. Plaintiff has been irreparably harmed by Defendants.

COUNT I – VIOLATION OF 42 U.S.C. SECTION 1983 – FAILURE TO REVIEW NEW MEXICO'S CHILD SUPPORT GUIDELINE AWARD AMOUNTS AND TO USE CURRENT ECONOMIC DATA ON COST OF RAISING CHILDREN FOR REVIEW OF THE AWARD AMOUNTS

24. Plaintiff incorporates by reference all preceding allegations as if fully set forth herein.

25. New Mexico voluntarily participates in IV-D as part of TANF that requires participating states to precisely conform to applicable federal law, 42 U.S.C.

§§ 651 et. seq. As a condition of the IV-D program, under 42 U.S.C. § 667(a), New Mexico is required to review, at least every four years, child support award amounts to ensure appropriate child support awards. 45 C.F.R. § 302.56 also requires that current economic data on the cost of child rearing be utilized during the mandated every four year review.

26. Plaintiff is a participant in New Mexico's child support program and is adversely affected and irreparably harmed by New Mexico's failure to follow federal law, 42 U.S.C. § 667(a).

27. Plaintiff's attorney, Robert Simon, notified CSED through its counsel in November 2002 of New Mexico's failure to review the child support guideline award amounts every four years and New Mexico's failure to use economic data on the cost of raising children during the review (**Exhibit 7, Email to Tom Sparr**). Upon information and belief, Plaintiff Garner has found no record of a review of New Mexico's child support guideline award amount every four years or any record that government published data on the current cost of rearing children was utilized. Upon information and belief, Plaintiff is unaware of any notification by New Mexico's CSEB to the Federal Child Support Enforcement Office, after New Mexico amended NMSA 1978 § 42-4-11.1 in 1989 to add section (j), for a determination by the Federal Child Support Enforcement Office of whether this statutory change invalidated New Mexico's federally approved CSEB program. Additionally, upon information and belief, Plaintiff is unaware of any notification to the Federal Child Support Enforcement Office that a New Mexico appeals court case *Leeder vs. Leeder*, 118 N.M. 603 (1994) conflicted with federal law or any request by New Mexico to the Federal Child Support Enforcement Office whether the holdings in *Leeder vs Leeder*, supra, invalidates New Mexico's

federally approved CSEB program. Upon information and belief, New Mexico has made no due diligence effort to determine whether New Mexico's CSEB program would be currently certified with these continued violations of federal law.

28. New Mexico's failure to review the guideline child support award amounts under 42 U.S.C. § 667(a) and under 45 C.F.R. § 302.56(h) and to collect economic data on the cost of rearing children for use during this review violates Plaintiff's rights under the Fifth and Fourteenth Amendments to ensure that the appropriate amount of child support is awarded and this violates 42 U.S.C. § 1983.

29. The 6th circuit court has held that regulations enacted by the Department of Health and Human Services pursuant to 42 U.S.C. §§ 651, et. seq. are within the scope of the statute, and apply to all parents, even those who receive no government funded AFDC, *CAPRA v. Sullivan*, 787 F.Supp., 724,725, (6th Circuit, Ohio) 1991 and that federal funding is available only if a state complies with both AFDC and Title IV-D and the regulations promulgated thereunder, *CAPRA v. Sullivan*, supra, 727. The 6th circuit also held that states must also review their guidelines periodically under 42 U.S.C. § 667, *CAPRA v. Sullivan*, supra, 727.

30. Plaintiff has suffered harm and will continue to suffer harm in the future as a direct and proximate result of Defendants' violations of Plaintiff's federally guaranteed right to have an appropriate amount of child support awarded that is based on the current cost of raising a child.

COUNT II – VIOLATION OF 42 U.S.C. SECTION 1983 – FAILURE TO ALLOW REBUTTAL OF NEW MEXICO'S GUIDELINE CHILD SUPPORT AWARD AMOUNT.

31. Plaintiff incorporates by reference all preceding allegations as if set forth herein.

32. New Mexico voluntarily participates in IV-D and is therefore required to conform to applicable federal law, 42 U.S.C. §§ 651, et. seq. as a condition for participating in the 1V-D program. 42 U.S.C. § 667(b)(2) states *"There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding in the record that application of the guidelines would be unjust or inappropriate in a particular case, as determined by criteria established by the state, shall be sufficient to rebut the presumption in that case."*

Plaintiff is a participant in New Mexico's child support adjudication process. Federal law and 42 U.S.C. § 667(b)(2) mandates states establish objective criteria so that participants in state programs have an opportunity to rebut the statutory guideline child support award amount in order to ensure a correct and appropriate award.

33. Defendants denied Plaintiff an opportunity to rebut New Mexico's statutorily child support presumptive guidelines award amount; the opportunity to present expert witnesses; the opportunity to present current economic date such as the *Monthly Labor Review*, May 2001, *A Century of Family Budgets in the United States*, published by the Department of labor (**Exhibit 8, A Century of Family Budgets in the**

United States) (Herein referred to as the "Monthly Labor Review") The Monthly Labor Review is the only published government study available that is based on actual household expenditures for children. All previous reported studies had been based on projections and guesses. Defendants failure to allow Plaintiff to rebut New Mexico's presumptive statutory guidelines amount of child support violated Plaintiff's rights under the Fifth and Fourteenth Amendments of the U.S. Constitution and conflicts with and violates federal law, 42 U.S.C. § 667(b)(2) and 45 C.F.R. § 302.56. This violates 42 U.S.C. § 1983.

34. Defendant's failure to include in the state's child support guidelines objective criteria to use in determining under what factual circumstances and in what manner the statutory presumption may be rebutted creates *an* absolute statutory presumption in favor of the statutory guideline amount in New Mexico. The U.S. Supreme Court has discussed statutory presumptions in *Bailey v. State of Alabama*, 219 U.S. 219, 225 (1911) "*The power to create presumptions is not a means to escape from constitutional restrictions. And the state may not in this way interfere with matters withdrawn from it by authority of the Federal Constitution . . .* " and further stated "*If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all the facts bearing upon the issue, there is no ground to hold the due process of law was denied him.*"

Bandini v. Superior Court, 284 U.S. 8, 18-19 (1931) held that presumptions must not deny persons a reasonable opportunity to present specific circumstances to rebut the presumption and stated: "*The state may provide proof of a particular fact, or several facts taken collectively, shall be prima facie evidence of*

another fact when there is some rational connection between the fact proved and the ultimate fact presumed. The legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense."

Leary v. U.S., 395 U.S. 6, (1969), *Tot v. U.S.*, 319 U.S. 463 (1943), and *Levine v. U.S.*, 424 U.S. 517, support the holding in *Bandini*, supra, that an absolute presumption constitutes a denial of procedural due process in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution.

Congress recognized that rebuttal of presumptive statutory child support guidelines is necessary because not all child support awards are correct or appropriate. The legislative history of P.L. 98-378, page 40, Guidelines for Child Support Awards (Section 17 of the bill), indicates Congress recognized that unrealistic awards may occur: *"COMMITTEE AMENDMENT- Although the child support enforcement program has greatly strengthened the ability of children to have support orders established and collected, there remains a continuing problem that the amounts of support ordered are in many cases unrealistic. This frequently results in awards which are much lower than what is needed to provide reasonable funds for the needs of children in the light of the absent parent's ability to pay. In some instances, however, there are also awards which are unrealistically high."* Congress subsequently addressed the problem of unrealistically low or high awards by making presumptive amounts of child support rebuttable under 42 U.S.C. § 667(b)(2) and 45 C.F.R. 302.56(f). By not adopting objective criteria and by not providing the opportunity to rebut the statutory child support guideline award amount, Defendant's have violated Plaintiff's rights

under the Fifth and Fourteenth Amendment of the U.S. Constitution and violated federal law and this violates 42 U.S.C. § 1983.

The 6th circuit court held that 42 U.S.C. § 667 is applicable to states in child support enforcement, *CAPR v. Sullivan*, 787 F.Supp. 724, 725, (6th Circuit, Ohio), 1991. A later ruling in the same case, *CAPRA v. Sullivan*, 787 F.Supp., 738,740, (6th Circuit, Ohio), 1992 stated "*Indeed, given that the challenged statute and regulation require an opportunity to rebut the presumptions obtained from use of state guidelines, a judicial proceeding on child support offers much more of an opportunity to be heard as the administrative procedures at issue in Mathews.* (*Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, (1976)). *CAPRA v. Sullivan*, supra, 740, also states "'*What the Fourteenth Amendment does require, however, is an opportunity granted at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of the case*'", quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148, 1158-59, 71 L.Ed.2d 265 (1982) as support for the applicability to states of the rebuttable presumption mandated in 42 U.S.C. § 667.

35. Plaintiff has suffered irreparable harm and will continue to suffer harm in the future as a direct and proximate result of Defendants' violation of Plaintiff's federally guaranteed rights to an opportunity to rebut New Mexico's presumptive guideline award amount.

COUNT III – VIOLATION OF 42 U.S.C. SECTION 1983 – FAILURE TO ALLOW A HEARING PRIOR TO A CHILD SUPPORT ORDER

36. Plaintiff incorporates by reference all preceding allegations as if set forth herein.

37. Plaintiff is a participant in New Mexico's child support enforcement program and federal law, 42 U.S.C. §§ 651, et. seq. Specifically 42 U.S.C. § 667 and 45 C.F.R. § 302.56 are applicable to the plaintiff. Failure of Defendants to comply with 42 U.S.C. § 667 and 45 C.F.R. § 302.56 and to ignore Plaintiff's due process rights under the Fifth and Fourteenth Amendments of the U. S. Constitution violates federal law. The 6th circuit court has already ruled that 42 U.S.C. § 667 is applicable to states' child support enforcement, *CAPRA v. Sullivan*, 787 F.Supp., 724,725, (6th Circuit, Ohio) 1991). Another holding in a subsequent decision, *CAPRA v. Sullivan*, 787 F.Supp., 738, 740, (6th Circuit, Ohio) 1992, also stated "'*What the Fourteenth Amendment does require, however, is an opportunity granted at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of the case*'", quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148, 1158-59, 71 L.Ed.2d 265 (1982) which held there is a need for a judicial hearing for rebuttal of the presumptive amount of child support.

38. The right to present evidence in support of one's position is one of the most basic rights accorded citizens in the United States. The U.S. Supreme Court has spoken on the issue of due process on multiple occasions. In *Little v. Streater*, 452 U.S. 1, 3 (1981) the Court stated "*The Fourteenth Amendment provides in part: 'No state shall . . . , deprive any person of life, liberty, or property without due process of law . . .*'".

In *Broddie v. Connecticut, et al*, 401 U.S. 371, 375 (1971) the Court stated *"The state obligations under the Fourteenth Amendment are not simply generalized ones; rather the state owes to each individual that process which is due." Broddie*, Ibid, 374, also held that marriage and divorce are compelling individual interests that must be litigated in a judicial forum and that an evidentiary hearing is required.

Mathews v. Eldridge, 424 U.S. 319, 325 (1976) stated *"This Court consistently held that some form of hearing is required before an individual is finally deprived of a property interest."* and *"The right to be heard before being condemned to suffer a grievous loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society."*

The standard for due process in child support adjudication should be higher, not lower, because under criminal statute 18 U.S.C. § 228 (**Exhibit 9, 18 U.S.C. § 228**), a person delinquent in paying a child support order is criminally guilty and the only options are a fine and/or incarceration.

Also, under 42 U.S.C. § 666(a)(9)(c) (**Exhibit 10, 42 U.S.C. § 666**), once support is ordered, the support due may never be retroactively adjusted and the support is forever due and even if the litigant was denied due process as in this case.

Furthermore, once a child support award is entered, without any requirement for a hearing or prior notice, states must revoke passports, suspend professional and other licenses, place liens on property and notify credit agencies under 42 U.S.C. §§ 652(k), 666(a)(1)-(4), (6)-(7), (16).

Defendants have violated Plaintiff's rights under the Fifth and Fourteenth Amendments of the U.S.

Constitution by not providing Plaintiff with a hearing and this violates 42 U.S.C. § 1983.

39. Plaintiff has suffered harm and will continue to suffer harm in the future as a direct and proximate result of Defendants' violation of federal law by denying Plaintiff a federally guaranteed right to be heard.

COUNT IV – VIOLATION OF 42 U.S.C. SECTION 1983 – NEW MEXICO'S STATUTES ARE SO VAGUE OR UNREASONABLE THEY DO NOT COMPLY WITH FEDERAL LAW AND HAVE NO MEANINGFUL OR OBJECTIVE CRITERIA TO ADJUDICATE CHILD SUPPORT AWARDS

40. Plaintiff incorporates by reference all preceding allegations as if set forth herein.

41. Plaintiff is a participant in New Mexico's child support program. 42 U.S.C. § 667 and 45 C.F.R. § 302.56 requires a state's child support legislation to contain criteria to determine when a child support award amount may be judicially adjusted upward or downward. A state can not thwart the intent or fail to follow the obligation of federal law by not establishing clear criteria. The 6th circuit court held that 42 U.S.C. § 667 is applicable to states for child support enforcement, *CAPRA v. Sullivan*, 787 F.Supp. 724, 725, (6th Circuit, Ohio), 1991.

42. Plaintiff requests this court to hold that NMSA 1978 §§ 40-4-11.1, 40-4-11.2 and 40-4-11.3 are impermissibly vague in establishing child support awards and thus, violate 42 U.S.C. § 667 and the relevant regulation, 45 C.F.R. § 302.56, *Guidelines for Setting Child Support Awards*. 45 C.F.R. §§ 302.56(e) & (f) & (g) &

(h), the relevant federal regulations governing New Mexico's child support statutes, state:

- (e) "The state *must review, and revise*, if appropriate, the guidelines established under paragraph (a) of this section at least once *every four years* to ensure *that their application results in the determination of appropriate child support award amounts.*" (Emphasis added)

- (f) "Effective October 13, 1989, the state must provide that *there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support*, that the amount of the award which would result from the application of the guidelines established under paragraph (a) of this *section is the correct amount of child support* to be awarded." (Emphasis added)

- (g) "A written finding or a specific finding on the record of a judicial or administrative proceeding for the award of child support that *the application of the guidelines established under paragraph (a) of this section would be unjust or inappropriate* in a particular case shall be sufficient to rebut the presumption in that case, as determined *under criteria established by the State.* Such criteria must take into consideration the best interests of the child. Findings that rebut the guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guideline." (Emphasis added)

- (h) "As a part of the review of a State's guidelines required under paragraph (e) of this section, *a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods,* on the application of, and deviations from, the guidelines. *The analysis of the data must be used in the State's review of the guidelines* to ensure that deviations from the guidelines are limited." (Emphasis added)

NMSA 1978 § 40-4-11.1 Child Support Guidelines violate 42 U.S.C. § 667 and 45 C.F.R. § 302.56. Specifically:

- NMSA 1978 § 40-4-11.1(A) has no definition or criteria or even a requirement for a "correct award" of child support, as mandated by 45 C.F.R. § 302.56(f).
- NMSA 1978 § 40-4-11.2 has no criteria "established by the state" to determine what constitutes "unjust" or "inappropriate" as mandated by 45 C.F.R. 302.56(g).
- New Mexico statutes have no requirement to consider economic data on the cost of raising children and to use the data on the cost of raising children in the State's review of the guidelines every four years as mandated by 45 C.F.R. 302.56(e).
- NMSA 1978 § 40-4-11.2 states no criteria for what constitutes "substantial hardship".
- NMSA 1978 § 40-4-11.1(B)(1) states no criteria for what constitutes "adequate" child support.
- NMSA 1978 § 40-4-11.3 requires the State to review statutory guideline amounts every four

years to ensure an "appropriate" amount of child support as mandated by 45 C.F.R. § 302.56(h), but Petitioner has found no record of such review by New Mexico during the last eight years.

- There are no objective statutory criteria established by New Mexico for rebutting the presumptive guideline support amounts as mandated by 45 C.F.R. § 302.56(g).

- NMSA 1978 § 40-4-11.1(j) is the only listed criteria that may allow a deviation from the statutory guideline child support and this is when the guideline "requires a person to pay another person more than 40% of his *gross income*" (Emphasis added), which is mathematically impossible under the calculations of NMSA 1978 § 40-4-11.1(k), unless a person has 17 or more children and thus is an illusionary, false and misleading criteria and thus fails by any rational criteria to be objective.

Yet, other portions of the child support statutes have great clarity. "Gross Income" is defined in multiple subparts of NMSA 1978 §§ 40-4-11.1(C)(1), (b), (c), (d), and (e) in such a manner that there is no doubt what constitutes "gross Income".

Objective criteria required by 42 U.S.C. § 667(b)(2) and 45 C.F.R. § 302.56(g) to define "unjust" or "inappropriate" or "adequate child support" or "correct" appear to be intentionally lacking in NMSA 1978 §§ 40-4-11.1, 40-4-11.2 or 40-4-1I.3 and thus New Mexico's laws violate the intent and the objectives of federal law.

The U.S. Supreme Court has discussed vagueness in laws in *Grayned v. City of Rockford*, 408 U.S. 104,

108-109, 92 S.Ct. 2294 (1972): *"Vague laws offend due process in two respects. First, they fail to provide persons targeted by the statute with "a reasonable opportunity to know what conduct is prohibited so that [they] can act accordingly." Second, by failing to provide explicit standards for those who apply them, vague laws "Impermissibly delegate basic policy matters to policeman, judges, and juries for resolution on a ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminating behavior."* and *"a statute must contain an explicit and ascertainable standard to present those charged with enforcing the statute's provision from engaging in 'arbitrary and discriminatory' enforcement." Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 44, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) *"Due process requires a State provide meaningful standards to guide the application of its laws." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*, 455 U.S. 489, at 499, 102 S.Ct 1186, 71 L.Ed.2d 362 (1982), *"When a law threatens to inhibit the exercise of constitutionally protected rights, such as the present case, the Constitution demands that courts apply a more stringent vagueness test."* See also *Karlin v. Foust*, 1888 F.3d 466 (7th Cir. 1999); *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999) and *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000).

This Court should determine whether NMSA 1978 § 40-4-11.1 through 3 are impermissibly vague when tested against 42 U.S.C. § 667 and 45 C.F.R. § 302.56 and particularly when criminalization may occur under 18 U.S.C. § 228 if there is delinquency in payment of a child support order established under New Mexico's statutes. Because criminalization occurs with a delinquency of a child support order, clear criteria and definitions in statutes used to establish child support orders are necessary to protect due process. A litigant's right to procedural due process is

abrogated when statutory language is so vague as to provide no meaningful guidance in a judicial hearing. Defendants failed to adhere to the intent and obligation of federal law and have violated Plaintiff's Fifth and Fourteenth rights under the U. S. Constitution and this violates 42 U.S.C. § 1983.

43. Plaintiff has suffered harm and will continue to suffer harm in the future as a direct and proximate result of Defendant's violation of Plaintiff's federal right that New Mexico's child support statutes comply with federal law, 42 U.S.C. § 667 and 45 C.F.R. § 302.56 such that New Mexico's child support statutes are not so vague or unreasonable as to provide no meaningful guidelines for adjudication of child support award amounts and fail to follow the intent or obligation of federal law.

COUNT V – VIOLATION OF 42 U.S.C. SECTION 1983 – FAILURE TO OVERTURN A PRIOR NEW MEXICO APPEALS COURT DECISION THAT PREVENTS REBUTTAL AND VIOLATES FEDERAL LAW

44. Plaintiff incorporates by reference all preceding allegations as if set forth herein.

45. Plaintiff is a participant in New Mexico's child support program and federal law. 42 U.S.C. § 667(b)(2) mandates the right to rebut any child support guideline award amount. The 6th circuit court held that 42 U.S.C. § 667 is applicable to states for child support enforcement, *CAPRA v. Sullivan*, 787 F.Supp. 724, 725 (6th Circuit, Ohio), 1991. Thus, this law is applicable to Plaintiff.

46. New Mexico's Appeals Court decision in *Leeder vs. Leeder*, 118 N.M. 603 (1994) conflicts with federal law, specifically 42 U.S.C. § 667(b)(2), and denies Plaintiff

his rights under the Fifth and Fourteenth Amendments of the U. S. Constitution and violates 42 U.S.C. § 1983.

47. The right to rebut in New Mexico is voided and eliminated by the decision in *Leeder v. Leeder*, 118 N.M. 603, 605, that states: "*The guidelines are not intended to reflect what the parents have in fact been spending for the care, maintenance, and education of their children. Rather they set a presumptive figure for what the parents should be spending.*" And Ibid, page 605 stated: "*We conclude that the guidelines are presumed to provide the proper amount of child support and that Section 40-4-11(A)(?) is ordinarily satisfied if the court sets forth the computations [***6] made under the guidelines.*"

48. Thus in New Mexico, judges and hearing officers have relied on the ruling in *Leeder v. Leeder*, supra, to not allow rebuttal of the presumptive guideline amount of child support if child support is computed using the guidelines.

49. In the present case, in the Memorandum Opinion, the New Mexico Court of Appeals ignored the conflict between *Leeder v. Leeder*, supra, and 42 U.S.C. § 667(b)(2) that requires a rebuttable presumption, even though Petitioner raised the contradiction in his DOCKETING STATEMENT, filed January 29, 2003 (**Exhibit 5, Docketing Statement, page 18-19**).

50. New Mexico's Appellate Court decision in *Leeder v. Leeder,* supra, is also in conflict with decisions of other state courts of last resort and federal appellate courts.

- In *Rose on behalf of Clancy v. Moody,* 629 N.E.2d 378, 381 (NY-1993) citing *Matter of Rose v. Haney,* 592 N.Y.S.2d 531 states "*42 U.S.C. § 667(b)(2) directly prohibits a state from enacting child support guidelines*

which permit no rebuttal of the amount awarded."

- *In re Marriage of Gilbert,* 945 P.2d 238 (Wash. App. Div. 1 1997) ruled in favor of federal preemption of a state's mandatory minimum child support of $25.00, *"even if the rebuttal reduced the guideline amount to zero due to inability to pay."*

- *Jackson v. Rapps,* 947 F.2d 332, 336, 1991 U.S. App. Lexis 24734 App. Lexis 320, citing *Gorrie v. Bowen,* 809 F.2d 508, 520 (8th Cir. 1987) stated, *"The state voluntarily accepts conditions imposed by Congress and once it chooses to do so, the Supremacy Clause obliges it to comply with all federal AFDC requirements."*

51. Under the Supremacy Clause, New Mexico's courts have a concurrent duty to enforce federal law according to their regular modes of procedure, *Claflin v. Houseman*, 93 U.S. 130, 136-137 (1876). A court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a "valid excuse", *Douglass v. New York, N.H. & H.R. Co.,* 279 U.S. 377, 387-389 (1929). An excuse that is inconsistent with or violates federal law is not a valid excuse. The Supremacy Clause forbids state courts to disassociate themselves from federal law because of a disagreement with its content or a refusal to recognize the superior authority of its source, *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 57 (1912) and even a neutral state rule of judicial administration is invalid if that rule is preempted by federal law, *Felder v. Casey,* 487 U.S. 131, 139 (1988).

Also, *Chambers v. Capital Cities/ABC,* 851 F.Supp. 543 (S.S.N.Y. 1994) held that neither state or local

laws may be enforced or implemented in such a way as to frustrate the objectives of federal law.

52. In this case, the Defendants ignored the conflict of *Leeder v. Leeder*, supra, and no reference is made to *Leeder v. Leeder,* supra, in any part of the Memorandum Opinion. (**Exhibit 3, Memorandum Opinion**). Defendants violated federal law and Plaintiff's Fifth and Fourteenth Amendment rights under the U.S. Constitution and this violates 42 U.S.C. § 1983.

53. Plaintiff has suffered harm and will continue to suffer harm in the future as a direct and proximate result of Defendant's violation of Plaintiff's federally guaranteed rights to have federal law acknowledged and properly applied in adjudication of child support in New Mexico.

COUNT VI – VIOLATION OF 42 U.S.C. SECTION 1983 – FAILURE TO PROVIDE THE SCIENTIFIC BASIS OF THE NEW MEXICO CHILD SUPPORT GUIDELINE AWARD AMOUNTS

54. Plaintiff incorporates by reference all preceding allegations as if set forth herein.

55. New Mexico voluntarily participates in IV-D programs as part of TANF and is required to precisely conform to applicable federal law, 42 U.S.C. §§ 651 et. seq.

56. As a condition of the IV-D program, under 42 U.S.C. § 667(a), New Mexico is required to establish guidelines for child support award amounts. The 6th circuit court held that 42 U.S.C. § 667 is applicable to states for child support enforcement, *CAPRA v. Sullivan*, 787 F.Supp. 724, 725 (6th Circuit, Ohio) 1991.

57. New Mexico has not provided the scientific basis for its statutory guideline child support award amounts even though requested to do so by Plaintiff (**Exhibit 11, Letter to Tom Sparr, CSED, 1st Paragraph, #1**).

58. Federal law also requires that the guidelines be reviewed every four years and that current economic data on the cost of rearing children in New Mexico be utilized for this review. New Mexico's CSED was requested to provide the economic data used in the reviews and was requested to provide a copy of the review of the child support guidelines for the preceding 8 years (**Exhibit 11, letter to Tom Sparr, CSED, 1st paragraph, #2**).

59. New Mexico failed to disclose the requested data or the scientific basis and assumptions used in developing its statutory guideline amounts of child support (**Exhibit 11, Letter to Tom Sparr, 2nd paragraph**). If the scientific basis for the guideline presumptive amounts is not valid the statutory guidelines are not enforceable. See *Kumho Tire Co, LTD, et al. v. Carmichael et al.*, U.S. Supreme Court, No. 97-1709 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

60. Guidelines not based on current economic data and scientific principles violate Plaintiff's Fifth and Fourteenth Amendment rights and violates 42 U.S.C. § 1983.

61. Plaintiff has suffered harm and will continue to suffer harm in the future as a direct and proximate result of Defendants' violations of Plaintiff's federally guaranteed right to know the scientific basis of New Mexico's presumptive child support award amounts.

COUNT VII – DECLARATORY JUDGMENT

62. Plaintiff incorporates by reference all preceding allegations as if fully set forth herein.

63. Plaintiff brings this claim for declaratory relief pursuant to 28 U.S.C. § 2201.

64. An actual controversy exists under the TANF and IV-D, the child support enforcement regulations, 42 U.S.C. §§ 651, et. seq. and particularly 42 U.S.C. § 667 and 45 C.F.R. § 302.56 and with respect to whether Defendants are required to provide to Plaintiff:

    a. Review of New Mexico's child support guideline award amounts every four years and to utilize current economic data on the cost of rearing children in New Mexico and/or other sources to ensure the appropriate award of plaintiff's child support obligation order.

    b. An opportunity to rebut New Mexico's statutory child support award amount.

    c. A hearing when adjudicating child support orders.

    d. Statutes that sufficiently conform to federal law to provide precise and reasonable guidelines with objective criteria so that the intent and obligations of federal law are followed in the adjudication of child support orders.

    e. Judicial decisions in New Mexico that adhere to the intent and obligations of federal law rather than conflict with and thwart federal law.

f. Child support guideline award amounts that are based on scientifically gathered data collected every four years on the cost of raising children. And whether Defendants are complying with these obligations and what federal law and regulations and the United States Constitution oblige the Defendants to do in the way of providing services to the Plaintiff and to protect Plaintiff's rights of due process.

Plaintiff requests this Court declare Plaintiff's rights and the State of New Mexico's obligations under applicable federal laws and regulations of IV-D and the United States Constitution.

WHEREFORE, Plaintiff respectfully requests that this court grant the following relief:

1. Declare that New Mexico's laws are defective and that Defendants violated Plaintiff's rights under IV-D statutes and implementing regulations by failing to review child support award amounts every four years and/or failing to use current economic data for the cost of raising children in New Mexico or other sources of economic data for the review of child support guideline award amounts.

2. Declare that New Mexico's laws are defective and that Defendants violate Plaintiff's rights under IV-D statutes and implementing regulations by failing to allow rebuttal of the presumptive child support guideline award amount.

3. Declare that New Mexico's laws are defective and that Defendants violate Plaintiff's rights under IV-D statutes and implementing regulations by failing to allow Plaintiff a hearing to present evidence in child support adjudication.

4. Declare that New Mexico's laws are defective and that Defendants violate Plaintiff's rights under IV-D statutes and implementation regulations by failing to provide precise and reasonable criteria in New Mexico's statutes such that the intent and obligations of federal law are followed for child support adjudication.

5. Declare that New Mexico's laws are defective and that Defendants violated Plaintiff's rights under IV-D statutes and implementing regulations by using child support guideline award amounts that or not based on scientific principles and current economic data.

6. Declare that New Mexico's laws are defective and that Defendants violated Plaintiff's procedural and substantive due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.

7. Declare that under Congress' Spending Powers that federal law preempts New Mexico statutes and court decisions that do not precisely comply with federal child support enforcement law and regulation.

8. Grant Plaintiff injunctive relief under 42 U.S.C. § 1983 if declaratory relief is not available against Defendants Loughren, Robinson, Vigil and Bustamante.

9. Enter a permanent injunction to require state officials and employees in New Mexico to comply with federally mandated procedures.

10. Enter a permanent injunction to require that New Mexico develop child support awards that are based on current and scientifically provable data.

11. Enter a permanent injunction to require that when New Mexico amends its child support enforcement statute NMSA 1978 § 40-4-11, that any amendment is sent for review to the Federal Child Support Enforcement Office to ensure the amendment does not violate federal law.

12. Award Plaintiff reasonable attorney's fees and cost; and

13. Award such other relief as this Court deems just and proper.

Respectfully submitted,

Robert Simon
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